LIBRARY
SUPREME COURT, U. S.
FILED
SEP 22
E. ROBERT SEAVER

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-17

GARRETT H. BYRNE,
APPELLANT,

v.

P.B.I.C., INC., NATOMA PRODUCTIONS, INC., FRANK BUTLER, MARJORIE DUNAWAY, JORY RICHARDSON, BROOKE LAPPIN, MORTON L. LEAVY, DONALD FRANCIS TIRABASSI, and MARLENA LANGSTON,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts 02109
HENRY PAUL MONAGHAN
10 P.O. Sq.
Boston, Mass. 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Statement of the Case	2
Questions Presented	4
Argument	
Point I. The District Court Correctly Concluded That Section 16 and the Common Law Offense were Unconstitutional in the Context of Concededly Non-Obscene Live Theatre Performances	5
A. In Failing To Require Any Element of Obscenity, The Massachusetts Offenses Are Unconstitutionally Overbroad	5
B. The Massachusetts Offenses Are Impermissibly Vague In A First Amendment Context	8
Point II. The District Court Did Not Commit Error In Granting Declaratory and Injunctive Relief	11
A. The Original Relief Granted By The District Court	12
1. Injunctive Relief	12
2. Declaratory Judgment	18
B. The Present Posture of the Case	19
Conclusion	20
Appendix A	21

Table of Citations

Cases

Adams Newark Theatre Co. v. *Newark*, 22 N.J. 472 (1954), aff'd 354 U.S. 931	6
Amalgamated Food Employees Union v. *Logan*, 391 U.S. 308	7
Barrows v. *Municipal Court*, 1 Cal. 3d 821 (1970)	6, 8, 10

	Page
Beal v. *Missouri Pac. R.R.*, 312 U.S. 45	14
Benton v. *Maryland*, 395 U.S. 784	20
Bloss v. *Dykeman*, 398 U.S. 278	8
Boyle v. *Landry*, 401 U.S. 77	20
Breswick & Co. v. *United States*, 75 S.Ct. 912	15
Brown v. *Louisiana*, 383 U.S. 131	7
Byrne v. *P.B.I.C.*, 401 U.S. 987	4, 19
Byrne v. *P.B.I.C.*, 401 U.S. 987	4, 9
Cain v. *Kentucky*, 397 U.S. 319	8
Cameron v. *Johnson*, 390 U.S. 611	12
Carafas v. *LaValle*, 391 U.S. 234	20
Coates v. *Cincinnati*, 402 U.S. 611	10
Cohen v. *California*, 403 U.S. 15	7
Commonwealth v. *Broadland*, 316 Mass. 20	2, 4, 9
Commonwealth v. *Dickinson*, 348 Mass. 767	9
Commonwealth v. *Wardell*, 128 Mass. 52	9
Cowgill v. *California*, 396 U.S. 371	7
Dombrowski v. *Pfister*, 390 U.S. 479	12, 13, 14, 16
Dyson v. *Stein*, 401 U.S. 200	13
Ginsberg v. *New York*, 390 U.S. 629	20
Golden v. *Zwickler*, 394 U.S. 103	20
Gregory v. *Chicago*, 394 U.S. 111	7
Hall v. *Beals*, 396 U.S. 45	19
Hygrade Provision Co. v. *Sherman*, 266 U.S. 497	14
Interstate Circuit v. *Dallas*, 390 U.S. 676	6, 8, 10
Jacobellis v. *Ohio*, 378 U.S. 184	8
Lanzetta v. *New Jersey*, 306 U.S. 451	10
LaRue v. *California*, 326 F.Supp. 348 (D. Cal. 1971)	6
Manual Enterprises v. *Day*, 370 U.S. 478	8
Nelson v. *Iowa*, —— Iowa ——, 178 N.W.2d 448, cert. den. 401 U.S. 923	8
Organization For A Better Austin v. *Keefe*, 402 U.S. —	7
P.B.I.C. v. *Byrne*, 313 F.Supp. 757	2

Page

P.B.I.C. v. *District Attorney of Suffolk County*, Mass. Adv. Sh. (1970) 566 3
People v. *Bercowitz*, 308 N.Y.S.2d 1 (1970) 6
Perez v. *Ledesma*, 401 U.S. 82 ..... 13, 17, 18
Powell v. *McCormack*, 395 U.S. 486 19
Samuels v. *Mackell*, 401 U.S. 66 ..... 13, 17, 18
Sanks v. *Georgia*, 401 U.S. 144 20
Shacht v. *United States*, 398 U.S. 58 5
Sibron v. *New York*, 392 U.S. 40 20
Terrace v. *Thompson*, 263 U.S. 197 14
United States ex rel, Knauff v. *McGrath*, Oct. Term 1949, printed in 96 Cong. Rec. A3750 15
United States v. *O'Brien*, 391 U.S. 376 7
Younger v. *Harris*, 401 U.S. 37 ..... 12, 14, 17, 18, 20
Zwickler v. *Koota*, 389 U.S. 241 ..... 10, 17, 18

Statutes

28 U.S.C. § 1253 ..... 4, 19
Mass. General Laws:
c. 272, § 16 ..... 2, 3, 4, 5, 8, 9, 10, 11
U.S. Supreme Court Rules
No. 15(c) 20
15(g) 13

Miscellaneous

83 Harv. L. Rev. 844 16

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-17

GARRETT H. BYRNE,
APPELLANT,

v.

P.B.I.C., INC., NATOMA PRODUCTIONS, INC., FRANK BUTLER, MARJORIE DUNAWAY, JORY RICHARDSON, BROOKE LAPPIN, MORTON L. LEAVY, DONALD FRANCIS TIRABASSI, and MARLENA LANGSTON,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Plaintiffs-appellees[1] move to affirm the judgment on the ground that it is manifest that the questions on which the

[1] The parties are referred to by their designations in the court below.

cause depends are so unsubstantial as not to need further argument.

Statement of the Case.

On February 22, 1970, live theatre performances of *Hair* opened for an indefinite run in Boston. *Hair* is a rock musical which deals with the life style of many young people and their attitudes on such issues as the Vietnam war, racism, sex, drugs and pollution. At the time of its Boston opening, *Hair* was currently playing in at least five cities in the United States and fourteen cities throughout the world. It has been described by Clive Barnes of the New York Times as the most important musical that had appeared since "Oklahoma" in 1944.[2] However, defendant, the district attorney for Suffolk County, threatened multiple criminal prosecutions against plaintiffs, the producers and cast of *Hair*, if the play were produced in Boston.

Defendant does not assert that *Hair or any scene therein* is obscene. Specifically disclaiming any such contention, defendant asserts that certain scenes allegedly violated the Massachusetts statutory prohibition against "open and gross lewdness" (G.L. c. 272, §16) and the "closely similar"[3] common law offense of "indecent exposure." On May 6, 1970, a divided three-judge federal district court, in an opinion by Judge Coffin, found that since these offenses did not require proof of *any* of the elements of obscenity, they were unconstitutional; and, after making detailed and specific findings that plaintiffs would suffer irreparable injury, the court enjoined the threatened criminal prosecutions. *P.B.I.C.* v. *Byrne*, 313 F. Supp. 757.

The district court acted only after the state supreme

---

[2] Tr. p. 49 of hearings in supreme judicial court of Massachusetts, which hearings were, by stipulation, treated as evidence properly before the district court. See footnote 5, *infra*.

[3] *Commonwealth* v. *Broadland*, 315 Mass. 20, 22.

court had refused plaintiff's prior efforts to determine whether these Massachusetts criminal offenses had — or constitutionally could have — any application to a concededly non-obscene live theatre performance. *P.B.I.C. v. District Attorney of Suffolk County*, Mass. Adv. Sh. (1970) 566.[4] In response to defendant's explicit threats of criminal prosecutions, plaintiff had originally filed suit in the state supreme court seeking a declaration that section 16 was inapplicable to live theatre productions and, if applicable, was unconstitutional; plaintiffs also sought an injunction restraining the threatened prosecutions. However, on April 9, 1970, the state court, in a terse rescript opinion, while recognizing the substantial nature of the substantive federal claims raised, refused without discussion to give declaratory relief, and as a matter of its "discretionary equitable jurisdiction, infrequently exercised" granted limited injunctive relief — *without deciding the merits of the federal claims* — only if plaintiffs made certain excisions.

Plaintiffs refused to avail themselves of an injunction on the terms offered. They believed that to do so would compromise "the integrity of the production" (313 F. Supp. at 761). Rather than face the risks involved in multiple prosecutions, plaintiffs immediately closed the play and commenced an action in the United States District Court seeking declaratory and injunctive relief. In the district court, all the judges recognized that the state court had not decided the merits of plaintiffs' federal claims, and defendant does not assert the contrary in his jurisdictional statement. The district court held an evidentiary hearing,[5] and on May 6 entered a permanent injunction against the threatened prosecutions.

---

[4] Reprinted as an appendix to the opinion of the district court. (313 F. Supp. at 768; J.S. pp. 39-40)

[5] The evidence before the district court consisted of certain live testimony, numerous stipulations and, by agreement, a copy of the transcript of the testimony before the state supreme court.

Defendant then appealed directly to this Court under 28 U.S.C. §1253. *Byrne* v. *P.B.I.C.*, No. 484, Oct. Term 1970. On January 11, 1971, plaintiffs' counsel advised this Court that *Hair* had ceased its public performances in Boston, but that defendant apparently still intended to prosecute. On March 29, 1971 this Court vacated the judgment and remanded the case to the district court "to consider the question of mootness" (401 U.S. 987). The district court held an evidentiary hearing on May 5, 1971. After finding that the defendant intended to prosecute, the court unanimously concluded that the case was not moot and reinstated its injunction. (J.S. 59) This appeal followed.

Additional facts are stated where necessary to the argument.

Questions Presented.

1. Are G.L. c. 272, §16's prohibition against "open and gross lewdness"[6] and the "closely similar" common law offense of "indecent exposure"[7] unconstitutional in the context of a theatre performance absent a showing that neither the play as a whole nor any scene therein is obscene?

2. Did the district court abuse its discretion granting declaratory and/or injunctive relief against defendant's threatened criminal prosecutions?

---

[6] Mass. Gen. Laws Ann. ch. 272 § 16, provides:

> "A man and woman who, not being married to each other, lewdly and lasciviously associate and cohabit together, or a man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars.

[7] The judges below recognized that the common law offense is so "closely similar" *Commonwealth* v. *Broadland*, 215 Mass. 20, 22) to the statutory offense that it requires no separate consideration. (313 F. Supp. at 764 n.10; id. at 768 n.1).

Argument

POINT I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 16, AND THE COMMON LAW OFFENSES WERE UNCONSTITUTIONAL IN THE CONTEXT OF CONCEDEDLY NON-OBSCENE LIVE THEATRE PERFORMANCES.

A. *In Failing To Require Any Element of Obscenity, The Massachusetts Offenses Are Unconstitutionally Overbroad.*

There is no contention that *Hair or any scene therein* could be characterized as "obscene" no matter how that term is defined. The threatened prosecutions here are for "open and gross lewdness" and the "closely similar" offense of "indecent exposure". *At every stage in this litigation defendant has argued that no obscenity criteria need be satisfied* in such prosecutions. The district court rightly rejected this contention.

The district court recognized that since earliest times live theatre has been an important medium for the exchange of ideas. As such, it is entitled to the protection of the first amendment (*Shacht* v. *United States*, 398 U.S. 58, 61,) and, as elsewhere, what falls short of obscenity is constitutionally protected (313 F. Supp. at 763-64). In so holding, the district court fully recognized that each medium presents its own set of problems so that any definition of obscenity must "take account of the differences inherent in [the various] media." (Id. at 763)[8] But the offenses here at issue were unconstitutionally overbroad because

[8] Wide screen, larger-than-life movie productions may be entitled to *less* constitutional protection than live theatre performances of the same subject where such magnification is absent and where, as the district court recognized (*Id.* at 764), "pose, lighting, angle of audience vision, mobility and dramatic context" are particularly important.

they purported to *dispense entirely with any obscenity criteria*, however defined.

The district court's decision was in accord with the decision of every court which has considered the problem. We know of no decision, and defendant cites none, in which a standard which entirely dispenses with obscenity — however defined to take account of differences in the various media — has been held constitutionally sufficient. This is clearly the case with respect to motion pictures. See the discussion in *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682-90 (and note 15); see also cases cited by the district court (313 F. Supp. at 763 n.9). And the same rule has — without exception— been applied to live theatre. *LaRue* v. *California*, 326 F. Supp. 348, 354 (D. Cal. 1971) (three judge court); *Barrows* v. *Municipal Court*, 1 Cal. 3d 821 (1970); *People* v. *Bercowitz*, 308 N.Y.S. 2d 1 (1970); *Adams Newark Theatre Co.* v. *Newark*, 22 N.J. 472 (1954), aff'd 354 U.S. 931. In *Barrows* v. *Municipal Court, supra*, the California Supreme Court emphasized that "any more restrictive rule could annihilate in a stroke much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." (*Id.* at 831).

These decisions dealing with the live theatre — *none of which is even mentioned by defendant* — are plainly correct. Certainly, if motion theatre productions are constitutionally entitled to the protection of obscenity standards — as every court in the country assumes — no sufficiently principled justification can be advanced for holding these standards wholly inapplicable to a live theatre performance of the same matter. Recognition that media differences may justify somewhat different conceptions of obscenity provides no warrant for holding obscenity criteria entirely inapplicable to live theatre. Nor can any sufficient distinction between the two media be grounded on any over-simplified distinction between "speech" and "con-

duct." Every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech. Thus the conduct of distributing leaflets is protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus," are both entitled to considerable protection under the first amendment. *Amalgamated Food Employees Union* v. *Logan*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without it. This is particularly true of live theatre — a medium of expression older than recorded history itself. In the theatre, there is an inseparable union of words and action, which together have served as a vehicle for conveying ideas. This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary; it has always had "a recognizable communicative aspect [which is] beyond dispute". *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). Accordingly, the non-speech aspects of the theatre (if any) can be regulated only upon a showing of "a sufficiently important governmental interest" (*United States* v. *O'Brien*, 391 U.S. 367, 376) which, in this context, requires a showing of obscenity.

Since the Massachusuetts offenses here at issue do not require any showing of obscenity, however defined, either with respect to the play as a whole *or any scene therein*, the district court rightly held that they could not constitutionally be applied to a live theatre production. And in this respect we note, as did the district court (313 F. Supp. at 764-65), that neither movies nor live theatre is to be meas-

ured by the standards which obtain in the city streets. As the *Barrows* court said:

> "'Acts which are unlawful in a different context, circumstances, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.'" (Id. at 830)

Accordingly, it is a minimum constitutional requirement that the sexual activity complained of be patently offensive when measured by contemporary standards *for what is acceptable in the theatre. Manual Enterprises* v. *Day*, 370 U.S. 478, 487-88. (Harlan, J.).[9]

B. *The Massachusetts Offenses Are Impermissibly Vague In A First Amendment Context.*

Even if some standard other than obscenity were permissible, "indecent exposure" and "open and gross lewdness" are far too imprecise to be applied where first amendment interests are at stake. As the district court recognized, "precision of regulation must be the touchstone"[10] where the first amendment interests are involved. The district court then analyzed the Massachusetts decision construing section 16 and "indecent exposure" and, pointing to their history and purpose, indicated that they were not capable of acceptable application to theatre plays. (313 F. Supp. at 764-765).

---

[9] This is not a case of nudity occurring in public places as was *Nelson* v. *Iowa*, — Iowa —, 178 N.W. 2d 448, cert. den. 401 U.S. 923, relied upon by defendant. Here the nudity had dramatic relevance to a live threatre performance. There is, therefore, no room for the argument that nudity alone is sufficient to render the first amendment inapplicable. E.g., Harlan J., *Manuel Enterprises* v. *Day*, *supra*, at 490; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Cain* v. *Kentucky*, 397 U.S. 319; *Bloss* v. *Dykeman*, 398 U.S. 278.

[10] *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682.

The Massachusetts offenses are designed to prohibit certain sexual acts that are conducted in an open and offensive manner — to prohibit conduct which fairly can be characterized as involving "indecent exposure". In *Commonwealth* v. *Broadland*, 315 Mass. 20, 22, the court recognized that section 16 is "at least closely similar to the common law offense of indecent exposure", and it cited with approval its earlier decision in *Commonwealth* v. *Wardell*, 128 Mass. 52, 53, which discussed the elements of the common law offense:

> "The conduct of the defendant is thus intentionally, indecently, and offensively exposing himself in the house of another to two girls of tender years, *without necessity or reasonable excuse, and in such a way as to produce alarm* [the older girl who saw the exposure fled in fright], proves that he was guilty of gross lewdness and lascivious behavior."

These offenses, therefore, proscribe sexual exposure for its own sake, exposure unrelated to anything else, exposure whose offensiveness to men of ordinary sensibilities needs no elaboration. *Commonwealth* v. *Dickinson*, 348 Mass. 767; *Commonwealth* v. *Broadland*, supra. As defendent concedes (J.S. p. 14), they reach only nudity which is both "offensive" and "without reasonable excuse". It defies reason, we submit, to lump concededly non-obscene live theatre performances with the exposure involved in *Wardell*, *Broadland* and *Dickinson*.

Moreover, as the district court observed, each performance of *Hair* involves a broad range of activities to which the defendant objects. There are, said the court, "a variety of conceivably lewd scenes in the play, some solemn, some bumptions, some open, some covert. To date, the District Attorney has identified seven acts which in his mind violate

the statute." (313 F. Supp. at 766) If such unstructured, open-ended offenses as "open and gross lewdness" or "indecent exposure" can be applied to live theatre performances, no actor or producer can determine in advance what parts of a stage play involving "simulated" sexual conduct would be held to constitute a criminal act. Here, for example, most of the scenes complained of not only do not involve nudity, but in the words of the state supreme court, they are simply "incidental stage action which a jury *could* conclude was intended to simulate sexual intercourse or deviation". (Emphasis supplied.) Not only is such "simulation" constitutionally protected, as the motion picture decisions in this Court demonstrate, to permit the application of these vague offenses to live theatre performances would in effect "license . . . the jury to create its own standard in each case *ex post facto.*" *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Coates* v. *Cincinnati*, 402 U.S. 611. And, of course, since first amendment interests are at stake, the vagueness requirements are very exacting so that freedom of expression is not the victim of loosely drawn prohibitions. *Interstate Circuit* v. *Dallas, supra; Coates* v. *Cincinnati, supra.* Neither section nor "indecent exposure" can reasonably be characterized as offenses which are "obviously susceptible of a limiting construction." *Zwickler* v. *Koota*, 389 U.S. 241, 249 n.7; *Coates* v. *Cincinnati, supra.* What is more, *here plaintiffs unsuccessfully sought a limiting construction in the state court.*[11] *Cf. Barrows* v. *Municipal Court, supra.*

---

[11] Ignoring the fact that plaintiffs were unable to obtain one, the dissenting judge repeatedly states that section 16 might be given an acceptable narrowing construction. (313 F. Supp. at 768-69). Surely section 16 is not "obviously susceptible" to such a construction. The judge then spends the bulk of his opinion (313 F. Supp. at 768-72) discussing a point on which there is no disagreement, namely, that a "lewdness" statute might be constitutionally applied if it were construed to require all the elements of obscenity — a construction of section 16 which, it should be noted, has always been specifically rejected by the defendant. The judge then argues that "wholly unrelated" sexual activity occurring on stage might be con-

Point II. The District Court Did Not Commit Error In Granting Declaratory and Injunctive Relief.

Given defendant's vigorous objection to federal intervention, it is important to focus on the exact nature of his argument. Defendant objects to the original injunction entered by the district court on May 16, 1970, asserting that the circumstances *at that time* were insufficient to support federal relief even assuming the substantive unconstitutionality of the Massachusetts offenses. Defendant makes no contention that, in any event, the reinstatement of the injunction after this Court's remand constituted error because of changed circumstances. That is a separate question and defendant has, of course, waived any objection that the posture of the case before the district court on May 6, 1971, had so changed that — whatever the propriety of the original action — a different result was now called for. Thus, defendant asks this Court to consider this case on the factual situation that existed when the district court entered its *original* order.[12] On that basis, we believe that the

---

strued within the reach of section 16. (313 F. Supp. at 772-72). No one disagrees with that proposition as applied to a situation in which reasonable men would necessarily agree that the sexual aspects of the play had no rational connection to the play. It is very clear, however, that the dissenting judge intends something of a far different order — that the court substitute its judgment for that of the author on what is or is not "integral" to the play. (313 F. Supp. at 773-74). As the majority opinion recognized, if the protected character of a scene depended on a court's judgment as to dramatic relevance "the chilling effect on theatre generally would be of ice age proportions" (313 F. Supp. at 765). Moreover, as the majority opinion also points out, the judge's construction of section 16 involves a complete rewriting of the statute. Finally, at no time has defendant contended that the application of section 16 turns in any manner on whether the judge views the sexual activity as an "integral" part of the play. So far as defendant is concerned, the fact of sexual activity is alone sufficient to trigger the application of section 16.

[12] If the circumstances existing on May 16, 1970 were not sufficient to warrant federal relief, defendant apparently believes that this shows that the order entered on May 6, 1971 cannot be supported.

district court was clearly correct. For the convenience of the Court, however, we discuss in an appendix the propriety of the action taken by the district court on remand.

A. *The Original Relief Granted By The District Court.*

1. *Injunctive Relief.*

In its original action, the district court granted both a declaration that the Massachusetts laws could not be constitutionally applied to live theatre performances, and an injunction restraining threatened criminal prosecutions. Defendant vigorously challenges the propriety of injunctive relief. The challenge was entirely without substance. Even if the standards subsequently set down in *Younger* v. *Harris*, 401 U.S. 37, are to be applied wholesale to suits for injunctions against threatened criminal prosecutions,[13] the orig-

[13] It has always been recognized that "special circumstances" were required to support federal equitable intervention against threatened state criminal prosecutions. *Cameron* v. *Johnson*, 390 U.S. 611, 618. *Dombrowski* v. *Pfister*, 380 U.S. 479, particularized that concept: where first amendment interests are at stake, bad faith or overbreath will justify federal injunctive relief if there is a showing of substantial "chilling effect" on speech. This doctrine was specially formulated to protect first amendment interests. Candor requires recognition that *Younger* v. *Harris*, 401 U.S. 37, may have modified *Dombrowski*. There is language in the opinion of the court by Mr. Justice Black which suggests that a "chilling effect" is, by itself, insufficient to support federal equitable relief — that, in addition, other unusual circumstances must be present (*Id.* at 47-54). It is not altogether clear that this language is confined to situations where prosecutions are already pending, although the opinion at the outset specifically purports to limit its discussion to this question. (*Id.* at 41).

In view of the foregoing, we have measured the propriety of federal injunctive relief by the standards set out in *Younger*, and we believe that the district court's injunction satisfied those criteria. We would add, however, to the extent that Mr. Justice Black's opinion is taken to be directed toward non-pending as well as pending criminal prosecutions, it may not represent the view of a majority of the Court. Mr. Justice Douglas expressly disavows it. (401 U.S. at 58 et seq.) And

inal injunction was clearly valid. After concluding that the Massachusetts offenses were facially overbroad (*Dombrowski* v. *Pfister*, 380 U.S. 479), the district court made *detailed findings* concerning irreparable injury (313 F. Supp. at 766-77). In these circumstances the district court's carefully supported conclusion that injunctive relief was necessary should be accepted absent a showing of abuse of discretion. *Dyson* v. *Stein*, 401 U.S. 200, 203; Rule 15(g) of the Rules of this Court. The jurisdictional statement does not remotely approach any such showing. To the contrary, as will be shown, defendant's jurisdictional statement makes no serious effort to challenge the factual findings on which the court rested its decision; rather it seeks to obscure their significance. The central fact is, as the district court concluded, that if an injunction were denied, plaintiffs would have suffered grave and irreversible injury. If federal relief was not appropriate on this record, it is difficult to conceive of a case in which that relief would be properly granted.

The district court's findings may be summarized as follows:

1. The district court emphasized that plaintiffs faced the danger of multiple prosecutions. As the court said — on the basis of defendant's explicit representations and of the wide variety of his objections,[14] "defendant feels duty

---

Justices Brennan, White and Marshall do not accept Justice Black's view with respect to non-pending prosecutions, if indeed that be his view. See *Perez* v. *Ledesma*, 401 U.S. 82 at 117-130. And the opinion of Justices Stewart and Harlan is careful to leave open the question of the propriety of equitable relief where a criminal prosecution is not pending, 401 U.S. at 54-56. In any event, it is interesting to note that there is nothing in the language in *Samuels* v. *Mackell*, 401 U.S. 66, also an opinion by Justice Black, which even remotely suggests that declaratory as opposed to injunctive relief should not be awarded where, as here, there is no pending state prosecution, but the threat of one.

[14] The district court (313 F. Supp. at 766) noted that:

"each night's performance will offer the District Attorney new

bound to prosecute", and *"we cannot reasonably expect a single test case to settle the contours of the law"* (313 F. Supp. at 766; emphasis added) Compare *Younger* v. *Harris*, 401 U.S. 37, 48-49 (burden of "defense of a single prosecution" ordinarily does not warrant federal equitable relief against pending prosecution). *Byrne* v. *Karalexis*, 401 U.S. 216, 220 (semble). The district court reasoned that, in the circumstances before it, long standing decisions of this Court would have justified federal equitable intervention, wholly apart from *Dombrowski*. E.g., *Terrace* v. *Thompson*, 263 U.S. 197, 214-16; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500; *Beal* v. *Missouri Pac. R.R.*, 312 U.S. 45, 50-51. There decisions were fully approved in *Younger* v. *Harris*, 401 U.S. at 45-46, 49, 54.

In the jurisdictional statement, a somewhat strained effort is made to minimize the threat of multiple prosecutions. (J.S. pp. 10-11) Defendant asserts that there is no factual support for plaintiffs' charge of "harassment" (J.S. p. 10). But plaintiffs made no such charge. They alleged the threat of multiple prosecutions, not harassment. And on that point there can be no doubt. There is *no* representation in the jurisdictional statement that there would *not* have been multiple prosecutions. Indeed, the jurisdictional statement concedes that "prosecutions sufficient to bring about compliance with law [would] be undertaken (J.S. p. 10). In these circumstances, the jurisdictional statement alone establishes the existence of the *threat* of multiple prosecutions — and only a real threat, not the

---

opportunity to carry out his declared intent. Moreover, there are a variety of conceivably lewd scenes in this play, some solemn, some bumptious, some open, some covert. To date, the District Attorney has identified seven acts which in his mind violate the statute. Acquittal for participation in one of these acts does not bar prosecution for different conduct in another scene. We may therefore expect multiple prosecutions against members of the cast." See *Byrne* v. *Karalexis*, 396 U.S. 976, 983 (1969) (Opinion of Stewart, J.).

actuality of multiple prosecutions need be established to warrant injunctive relief. In any event, the district court specifically found that "defendant feels duty bound to prosecute" (313 F. Supp. at 766), and it had no doubt that the defendant intended to close the play down unless his views are complied with. That court is, of course, "closer to the facts [and has] heard the merits fully argued.[15] Its findings with respect to the threat of multiple prosecutions cannot be set aside here on the basis of defendant's denial of any intent to harass.

ii. Of importance to the district court was the "additional factor" of the "chilling effect of the First Amendment right of plaintiffs, others engaged in the theatre in Massachusetts and the theatre going public in the New England area. The "chilling effect" of threatened prosecutions is, as Judge Coffin recognized, of a substantial magnitude when plays, rather than motion pictures, are involved.[16] Moreover, as the court also recognized, a live theatre production is a "wasting" asset. If the film "I Am Curious Yellow" is temporarily not permitted to show in Boston, it can, nonetheless, be transported elsewhere to a

---

[15] Unreported opinion of Justice Jackson in *United States ex rel, Knauff* v. *McGrath*, Oct. Term 1949, printed in 96 Cong. Rec. A3750 at A3751. See also, *Breswick & Co.* v. *United States*, 75 S. Ct. 912.

[16] The district court observed that:

> "actors in 'Hair' must face either sentences of up to three years for sex offenses or, if the show closes, loss of their livelihood. Plaintiffs' dilemma cannot fail to influence other actors and producers, especially since theatre patrons may take offense from a variety of scenes, thus providing the prosecutor with a long shopping list. When faced with a prosecutor intent on extirpating lewdness in accordance with the mandate of the Supreme Judicial Court as he sees it, actors and producers will either avoid Boston altogether or will steer clear of the forbidden zone by excising constitutionally protected material in order to avoid the risk of a three year prison term. Either result is offensive to the First Amendment." (313 F. Supp. at 766-67).

waiting theatre; but the *Hair* cast, which was drawn almost entirely from the Boston community, obviously could not be moved with the same facility. Nor, of course, could the theatre itself immediately obtain a new play as could a movie theatre obtain a new movie. Finally, the uncertainty and delay in the attempt to reopen elsewhere necessarily does have a sharp and adverse effect on both the morale and artistic efforts of the cast.

To keep a theatre closed while substantial first amendment claims are being vindicated will therefore, have drastic consequences where first amendment interests are involved. Producers, actors and theatre owners will steer far wide of controversial plays. Delay and uncertainty alone have a substantial deterrent effect. *Dombrowski* v. *Pfister, supra;* Note, 83 Harv. L. Rev. 844, 853-58. Denial of injunctive relief will have particularly far-ranging effects; it will encourage those who recognize that first amendment interests can in many circumstances be destroyed simply by rendering their ultimate vindication too burdensome.

iii. The district court also made specific findings supporting its additional determination that "plaintiffs face a substantial financial loss even if they persist in the face of multiple prosecutions and prevail". (313 F. Supp. at 767). The relevant facts are undisputed and are quickly stated. "Hair" has had the largest advance sale in the history of Massachusetts legitimate theatre. At the time it was forced to close, "Hair" had played for five weeks to capacity audiences and had outstanding $600,000.00 worth of advance ticket sales. (Id. at 761) It was, as the district court said, scheduled "for an indefinite run." (Id. at 759) Absent injunctive relief, this situation would be completely reversed. On the basis of uncontradicted evidence before it, the district court found that

> "the production is losing *weekly* box office gross receipts of about $70,000, is making refunds of exchanges for tickets already sold, and is no longer making advance sales." (Id. at 761) (emphasis supplied.)

Defendant's response to these facts is most interesting. He says that the expurgated production may be as valuable as the unexpurgated one. (J.S., p. 11) But there is no expurgated production, and plaintiffs have refused to produce such a version — thereby surrendering their first amendment claims and those of the audience. Defendant also denies (J.S. p. 12) that a play is a wasting asset — a point already considered. Finally, defendants says that the monetary loss is not "paramount to the concept of federalism" (J.S. p. 12). That "concept" is, however, nowhere explained. Defendant's statement is simply rhetoric, not reasoning — and very unclear rhetoric at that. Surely defendant does not claim that the principles announced in *Younger* and *Samuels* (or in *Dombrowski*) are of constitutional dimension — wholly beyond change even by Congress! Defendant's rhetoric is, moreover, written in complete disregard of the history of federal equity practice in protecting federal constitutional rights against state abridgement. See cases cited in *Younger* v. *Harris*, 401 U.S. at 45-46; Brennan, J., concurring and dissenting in *Perez* v. *Ledesma*, 401 U.S. 82, 104-126. Defendant ignores the fact that our present federal structure presupposes that the federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution" (*Zwickler* v. *Koota*, 389 U.S. 241, 247), and this is particularly true where freedom of speech is at stake. Finally, the limitations of *Younger* were satisfied in this case even if they are held applicable to non-pending prosecutions.

2. *Declaratory Judgment.*

Zwickler v. *Koota,* 389 U.S. 241, makes plain that with respect to non-pending prosecutions (compare *Samuels* v. *Mackell,* 401 U.S. 66 on pending prosecutions), the propriety of declaratory relief must be assessed separately from the grant of equitable relief. We think that there is no serious question that the district court properly granted a declaratory judgment on the question of the facial overbreath of the Massachusetts offenses here in question. Surely, the need for original intervention by declaratory relief was appropriate, *particularly so where the state court had declined to act.*[17]

Nothing in *Samuels* v. *Mackell,* 401 U.S. 66, has any bearing on the propriety of declaratory relief. In that case, the Court was dealing with pending state criminal prosecutions and held that, ordinarily, declaratory relief should not be given where injunctive relief would be inappropriate under *Younger* v. *Harris,* 401 U.S. 37. But there was no suggestion that declaratory relief would be unavailable if no criminal proceeding were pending. Indeed to have so held would not only be inconsistent with one of the purposes of the declaratory judgment act (*Perez* v. *Ledesma,* 401 U.S. at 111 et seq. Brennan, J. concurring and dissenting) but would *sub silentio* overrule *Zwickler* v. *Koota, supra.*

To have denied declaratory and injunctive relief would have been a gross injustice to the first amendment rights of the viewing public. What is really at stake is the extent to which the "banned-in-Boston" syndrome is consistent with the guarantees of the first and fourteenth amendments to the constitution of the United States. For years "ban-

[17] Defendant's argument that the district court should have abstained (J.S. pp. 16-17) is nonsense. It wholly ignores the fact that plaintiffs had sought a narrowing construction from the state court but were unable to obtain one.

ned in Boston" has been a source of humor and amusement to many. It is, however, a deadly serious matter. Here it has operated to close down a play which has been described by the drama critic of *The Boston Globe* as "one of the best musicals [he had] ever seen" (Tr. 12), and by Clive Barnes of *The New York Times* as the most important musical in twenty-five years. (Tr. 49). Thousands of decent, upright people in Massachusetts wished to see the production of "Hair" as it is, not the production excised so as to satisfy this defendant. It is outrageous in the extreme to think that American citizens in New York, in Los Angeles, in Chicago, in San Francisco, in Seattle and in Las Vegas, not to mention citizens in virtually every major capital of the western world, as well as Tokyo, Sydney and Tel Aviv, could see this production, but the citizens in Massachusetts and other New England states may not. The district court correctly concluded that the constitution of the United States prohibited that result.

B. *The Present Posture Of The Case.*

Following the district court's ruling, defendant appealed directly to this Court under 28 U.S.C. §1253. On January 11, 1971, plaintiffs' counsel advised the Court that the play had closed, and on March 11, 1971, this Court remanded the case to the district court "to consider the question of mootness." *Byrne* v. *P.B.I.C.*, 401 U.S. 987. The district court held an evidentiary hearing at which defendant reiterated its intention to prosecute, whereupon the district court found that the case was not moot and reinstated its injunction. (J.S. p. 59) Defendant once again appealed.

In the technical sense, the only consideration with respect to mootness is whether the case retains its character as a "live controversy" (*Hall* v. *Beals*, 396 U.S. 45, 48; *Powell* v. *McCormack*, 395 U.S. 486, 495-500, 517-18) so as to con-

stitute a "case or controversy" within the meaning of article III. Given defendant's express intention to prosecute, there can be no serious argument that the case is moot (*Younger* v. *Harris*, 401 U.S. 37, 42)[18] and defendant does not urge the contrary. Nor does defendant urge that the fact that the play had closed has relevance here. It asks this Court to consider only the propriety of the injunctive and declaratory relief on the basis of the evidence before the district court on May 16, 1970. Defendant has, therefore, waived any objections which might otherwise be open to him because of the play's closing. Rule 15(c) of the Rules of this Court. We have, however, included an appendix discussion which demonstrates that, wholly apart from waiver, the district court's action was correct.

Conclusion.

The motion to affirm should be granted, and the judgment affirmed.

Respectfully submitted,

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts
HENRY PAUL MONAGHAN
10 Post Office Square
Boston, Massachusetts

---

[18] See also *Sibron* v. *New York*, 392, U.S. 40, 50-58, and its progency, *Ginsberg* v. *New York*, 390 U.S. 629, 634 n.2; *Carafas* v. *LaValle*, 391 U.S. 234, 237-38; and *Benton* v. *Maryland*, 395 U.S. 784, 790-91. And see *Sanks* v. *Georgia*, 401 U.S. 144, 150-51. Compare *Golden* v. *Zwickler*, 394 U.S. 103 (case moot where no threat of prosecution and statute had no impact on plaintiffs' primary conduct); *Boyle* v. *Landry*, 401 U.S. 77 (no basis for discretionary declaratory relief where no threat of criminal prosecution).

APPENDIX A

On being advised that the play had closed, this Court remanded the case to the district court "to consider the question of mootness". *Byrne* v. *P.B.I.C.*, 401 U.S. 987. The district court found that the case was not moot and reinstituted its injunction. On remand, the district court heard argument not only the question of mootness but whether it should dissolve its injunction and/or vacate its declaratory judgment, the district court's action in reinstating its injunction and not vacating its declaratory judgment was correct.

A. DECLARATORY JUDGMENT.

Zwickler v. *Koota*, 389 U.S. 241, makes plain that with respect to non-pending prosecutions (compare *Samuels* v. *Mackell*, 401 U.S. 66 on pending prosecutions), the propriety of declaratory relief must be assessed separately from the grant of equitable relief. We think that there is no serious question that the district court properly granted a declaratory judgment on the question of the facial overbreath of the Massachusetts offenses here in question. Surely, the need for original intervention by declaratory relief was appropriate, particularly so where the state court had declined to act. And reinstatement of the declaratory relief was surely sound. Indeed, a *refusal* of federal declaratory relief is inconsistent with sound principles of federalism, *because significant federal court intervention had already occurred*. The district court had already declared unconstitutional the statutory and common law offenses of indecent exposure in the context of live theatre performances. This decision on the constitutional question will be *res judicata* in a subsequent criminal prosecution against plaintiffs.[1]

[1] In any subsequent prosecution by the Commonwealth, this Court's ruling will have a preclusive effect, *Perez* v. *Ledesma*, 401 U.S. 82, 84. The suggestion by Mr. Justice Brennan (401 U.S. at 125) that this may not be the case is not sound. The preclusive effect of the

If that effect is lost as a result of a finding of mootness,[2] the state supreme court will be free to reach a different result on the constitutional issue. Should it do so and should the Supreme Court decline *certiorari*, the matter will again be before the district court on a habeas corpus. The state court's decision will, of course, not be *res judicata*. *Fay* v. *Noia*, 372 U.S. 391. The awkwardness of such a situation is, of course, apparent. The critical point here, we submit, is that significant federal intervention has already occurred, at a point in time at which it was clearly called for. Accordingly, sound judicial administration dictates that the constitutional questions here presented be resolved within the framework of the present federal court litigation.

Finally, we would add that nothing in *Samuells* v. *Mackell*, 401 U.S. 66, precludes declaratory relief. In that case, the Court was dealing with *pending* state criminal prosecutions and held that, ordinarily, declaratory relief should not be given where injuctive relief would be inappropriate under *Younger* v. *Harris*, 401 U.S. 37. But there was no suggestion that declaratory relief would be unavailable if no criminal proceeding were pending. *Zwickler* v. *Koota*, 389 U.S. 241 was not overruled. Moreover, this case was *not* remanded for reconsideration in light of *Mackell*. (Compare the order for remand entered in this

---

district court's judgment. In our view stems not only from accepted principles of *res judicata* (e.g., *Scott* v. *California Supreme Court*, 426 F.2s 300 (9 Cir. 1970), but is a necessary consequence of the Congressionally fashioned organization of the federal courts. It would radically distort the operation of the federal court system created by Congress if the judgments of the federal courts were not given a binding effect in any future litigation between the parties. Finally, and perhaps most importantly, if the judgment had no *res judicata* effect and could be revised in a subsequent state court proceeding it is doubtful whether the district court would have a "case or controversy" before it. Hart & Wechsler, *Federal Court and Federal System*, 100-102, 109-114, 136.

[2] If this case is dismissed as moot, the preclusive effect of the federal court ruling is uncertain. See *United States* v. *Munsingware, Inc.*, 340 U.S. 36, and *Disposition of Moot Cases by the United States Supreme Court*, 23 U. of Chic. L.Rev. 77, 96.

case with the orders entered at the same time in *Dyckes* v. *Ryan*, No. 5164; *Wade* v. *Buchanan*, No. 290; *Rollins* v. *Shannon*, No. 5013; *Wright* v. *City of Montgomery*, No. 28, all reported at 402 U.S. 987-89. What is more, *Mackell* clearly supports the issuance of declaratory relief here. *Mackell* restricted federal declaratory relief in pending state criminal prosecutions in order to avoid needless friction between the federal and state courts. Refusal of any federal relief was, therefore, justified in federalism terms. Here, as we have indicated, significant and entirely proper federal intervention had *already* occurred by virtue of the original decision of May 16, 1970, on the constitutionality of the Massachusetts offenses.

B. Reinstatement of Injunctive Relief.

Whether the injunction should have been reinstated is a matter not free from difficulty. As general propositions, it is of course, clear that a prayer for an injunction can become moot during an appeal (*Powell* v. *McCormack*, 395 U.S. 486, 517-18) and that changed conditions can warrant dissolution of an injunction even after a permanent injunction has been entered and the appeal process completed. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647-48; *Food Fair Stores* v. *Food Fair*, 177 F.2d 177, 186 (1 Cir. 1950). In this case, the critical issue would seem to be whether the injunction should have been reinstated if, pending the appeal, the wrongful conduct (i.e., the threat of criminal prosecutions) remains but some or all of the irreparable injury which supported the original issuance of injunction has been eliminated. In this regard, the federal court might act so as to protect those who exercised freedom of speech under the protection of the federal court injunction of May 16, 1970. See Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 517, 548. Moreover, it is possible that the present injury caused by one or more criminal prosecutions would by itself support injunctive relief, given the fact

that first amendment freedoms are involved. See opinion of Brennan, J. in *Perez* v. *Ledesma*, 401 U.S. 82, 93. It would, after all, be a matter of little comfort to the producers and cast of a play if they could be subject to multiple prosecutions one day after the play had closed. The "in terrorem" effect of the threat of criminal prosecutions would be considerable.

The question of the standards governing federal equitable relief against non-pending state prosecutions is, apparently, presently before this Court. E.g., *Roe* v. *Wade*, No. 70-18. Of course, we cannot propose to argue the matter extensively on a motion to affirm. However we urge that the reasoning of *Younger* should not be extended to that situation. The standards there set out for federal equitable intervention may well be appropriate in connection with state prosecutions for the regulation of the sale of bananas. But, we submit with deference, they show a remarkable insensitivity to the fact that free speech claims were involved. Moreover, *Younger* did not even advert to the possibility that the first amendment itself might *require* equitable relief in these circumstances. Monaghan, *First Amendment Due Process*, 83 Harv. L. Rev. 517, 547-551. The insufficiency of the Court's reasoning is, we submit, not saved by the creation, capitalization and constant repetition of the slogan "Our Federalism." Compare *Zwickler* v. *Koota*, 389 U.S. 241, 247 — federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution."

Even if the original injunction should not have been reinstated, the judgment of the district court should be affirmed. Reinstatement is essentially harmless error. The grant of declaratory relief was clearly proper, and was plainly right on the merits. Accordingly, whether the injunction was erroneously issued or reinstated is a matter

of no importance since defendant will not prosecute if the district court's views are sustained on the merits. The Court has jurisdiction over the appeal and can decide the substantive issues. See Stewart & Blackmun, J.J., concurring in *Perez* v. *Ledesma*, 401 U.S. at 90. It would be inappropriate to remand this case to the district court once more on the limited question of equitable relief. The judgment should therefore be affirmed outright or modified so as at least to affirm the declaratory judgment.